United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1142

To be submitted

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1142

UNITED STATES OF AMERICA,
Appellee,

—v.—

RENE TEXEIRA, FRANCIS TEXEIRA and
JUSTINO TEXEIRA,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ANGUS MACBETH,
JOHN C. SABETTA,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Rene, Francis and Justino Texeira appeal from endorsement orders entered on February 18 and 26, 1975, in the United States District Court for the Southern District of New York, by the Honorable Kevin Thomas Duffy, United States District Judge, denying their respective motions pursuant to Rule 35 of the Federal Rules of Criminal Procedure for an order correcting, reducing or modifying their respective sentences imposed on September 4, 1973.

Indictment 73 Cr. 509, filed in one count on May 29, 1973, charged Rene, Francis and Justino Texeira, and one other, with conspiracy to receive, conceal, buy, sell, and facilitate the transportation, concealment and sale of narcotic drugs, knowing the said drugs to have been illegally imported into the United States in violation of Title 21, United States Code, Sections 173 and 174 (since repealed).

Trial of the three defendants before the Honorable Kevin Thomas Duffy and a jury began on June 26, 1973 and concluded on July 6, 1973 with verdicts of guilty as to all three. On September 4, 1973, Judge Duffy sentenced Rene and Justino Texeira to 20 years' imprisonment and Francis Texeira to 15 years' imprisonment. The judgments of conviction were thereafter affirmed without opinion, 489 F.2d 753 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974).

On February 11, 1975, defendant Rene Texeira filed with the District Court a *pro se* motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure seeking to reduce, modify and correct his sentence. On February 18, 1975, Francis and Justino Texeira filed a similar *pro se* motion. Judge Duffy thereafter denied both motions by endorsement orders of February 18 and 26, 1975, respectively.

ARGUMENT

POINT I

Defendants' motions to correct, reduce or modify their sentences, pursuant to Rule 35, were correctly denied. The asserted errors in the conduct of the trial on which defendants rely may not be raised on a Rule 35 motion and are therefore not properly before this Court.

Defendants Rene Texeira, and Francis and Justino Texeira, respectively, on two separate but virtually identical sets of papers, moved below pursuant to Rule 35 of the Federal Rules of Criminal Procedure for an order correcting, reducing or modifying their respective sentences. In addition to what was, in substance, a plea for leniency, defendants claimed they were entitled to some unspecified change in their sentence because of asserted errors at trial

in the court's charge and the government's failure to meet its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and because of the ineffective assistance of counsel. The motions were correctly denied. Defendants' sentences were entirely legal and the trial court's exercise of discretion in declining to reduce those sentences cannot be challenged here. Furthermore, the trial court was entirely correct in summarily rejecting defendants' claims of trial error. Such errors are simply not cognizable in a Rule 35 proceeding and they are for like reason not properly before this Court for review.

Rule 35 provides that a sentence may be reduced within 120 days after final judgment and may be corrected at any time. Defendants appear to recognize that their motions for reduction of sentence were essentially "plea[s] . . . for leniency", 8A Moore's Federal Practice—Criminal Rules, ¶ 35.02 (rev. 1975), addressed to the discretion of the trial court and they properly do not challenge here the trial court's refusal to grant any such reduction (Defendants' Brief at 3).

Similarly, defendants do not contend, nor could they, that their sentences somehow exceeded the legal and permissible boundaries provided by law. Defendants were convicted of conspiracy to receive, conceal, buy, sell and facilitate the transportation, concealment and sale of narcotic drugs, knowing the said drugs to have been illegally imported into the United States in violation of Title 21, United States Code, Sections 173 and 174. Section 174 of Title 21 of the United States Code, then in force, provided that anyone convicted of such a violation shall be imprisoned not less than five years nor more than twenty years. 21 U.S.C. § 174 (1958 ed.). Defendants' sentences are thus clearly legal under the statute.

Defendants' claims for relief on this appeal are premised solely on asserted errors in the conduct of the

trial. Whatever the merits of those claims, and they have none (see, *infra*, Point II), they are simply not reviewable in this proceeding.

The Supreme Court has said of Rule 35, *Hill* v. *United States*, 368 U.S. 424, 430 (1962), that:

> "... the Rule's language and history make clear the narrow function of Rule 35 is to permit correction at any time of an illegal *sentence*, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence." (Footnote omitted)

Accord, *United States* v. *Donovan*, 301 F.2d 376 (2d Cir. 1962), *vacated and remanded on other grounds sub nom. Andrews* v. *United States*, 373 U.S. 334 (1963); *United States* v. *Sternman*, 433 F.2d 913 (6th Cir. 1970); *Funkhouser* v. *United States*, 260 F.2d 86 (4th Cir. 1958), *cert. denied*, 358 U.S. 940 (1959).

Issues which were or should have been raised on direct appeal may not be raised in a motion pursuant to Rule 35. In *Funkhouser*, for example, as here, defendant sought to raise issues as to the effectiveness of counsel. The court held that a Rule 35 motion "cannot be used as a substitute for an appeal" and denied relief. 260 F.2d at 87. It went on to say that "Rule 35 is a remedy only to correct an illegal sentence; and the sentence imposed here is not illegal in the sense that it is in excess of the punishment authorized" by the statute. *Id.*

Defendants have had their appeal; they may not now litigate issues appropriate to an appeal under the guise of appealing a Rule 35 motion. This appeal should be dismissed.

POINT II

Considered on their merits, defendants' claims are frivolous.

A. There was no error in the charge to the jury.

Defendants claim that since no heroin whatever was produced at trial, they were denied due process of law when Judge Duffy in his charge told the jury, ". . . the heroin found here has been illegally imported" (Tr. 726-727) (Defendants' Brief at 4-7).

This is a wilful misrepresentation of Judge Duffy's charge. In the statement complained of the trial court was discussing the then existing statutory presumption that all heroin found in the United States is illegally imported. The "here" referred to by Judge Duffy was clearly the territorial United States. Seen in context, there was simply no suggestion from the court that heroin had in fact been produced at trial. In pertinent part Judge Duffy's charge provided:

> "Now, it is going to occur to you . . . that there was no direct evidence that has been offered by the government to establish . . . illegal importation or that defendants knew of the illegal importation. In fact, I don't think reference was made to it at all.
>
> "The government, to establish its burden on these elements, relies upon a law which permits a jury . . . to draw an inference that it was illegally imported and, further, that the person shown to be in possession knew that the narcotic was illegally imported. . . .
>
> "A word to you as to why you may draw such an inference. Official investigations and congres-

> sional investigations indicate that all heroin found in the United States has been imported into the country, because heroin is not produced in the United States and it is illegal to import heroin, or the products from which heroin is derived, into the United States. Therefore, you may find, or you may infer—it is entirely up to you—that *the heroin found here has been illegally imported.*" (Tr. 726-727) (emphasis added).

No fair reading of this passage could conclude that Judge Duffy was suggesting that there had been heroin in the courtroom during the trial. Nevertheless, defense counsel objected to this part of the charge (Tr. 746). The objection, however, was not pursued on appeal, undoubtedly because of its patently frivolous nature. The argument merits the same summary rejection it received from Judge Duffy.

B. There was no failure on the part of the government to reveal any of the promises made by the prosecution to Pamela Ramirez, a government witness.

Defendants contend that the government violated their due process rights under the Fifth Amendment when it failed to develop on its direct examination of Pamela Ramirez, a government witness, all the promises made to her by the prosecution. While it is true that the prosecution, itself, chose not to elicit on direct examination the specifics of each of the promises made,* defendants'

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* On direct examination the following exchange between Mrs. Ramirez and the prosecution occurred:

> Q. Have any promises been made to you by the Government in return for your testimony?
>
> A. Yes.
>
> Q. What promises?

[Footnote continued on following page]

claim that the government failed to inform defendants' counsel before or at the trial of the specifics of the promises so made is unsupported by the record and is false.

Defendants' reliance on *Giglio* v. *United States*, 405 U.S. 150 (1972); *DeMarco* v. *United States*, 415 U.S. 449 (1974); and *Ring* v. *United States*, 419 U.S. 18 (1974), is misplaced. The record here amply demonstrates that there simply was no concealment. Reference to defense counsels' unfettered cross-examination of Mrs. Ramirez makes clear that the prosecution had provided counsel with the specifics of any and all promises made to that witness. Defense counsel questioned Mrs. Ramirez about whether or not her husband had been brought from Lewisburg to New York by the government at her request (Tr. 65); whether or not promises had been made to her about help in her husband's case (Tr. 86); whether or not there had been a promise or indication to her that her sentence would be reduced (Tr. 91-92, 94); and also questioned her about the possibility that her testimony was the product of threats from the government (Tr. 99).

While defense counsel did not explore the fact that, as a result of threats to her person, Mrs. Ramirez—who was then in custody serving a federal term of imprisonment—had been promised protection if she testified, the record amply demonstrates that counsel here were clearly aware

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A. That my sister would not be prosecuted or my brother would not be prosecuted, and I would not be prosecuted.
Q. Was any other promise made to you?
A. Yes.
Q. What was that?
A. That the sentencing judge would know of my cooperation.
Q. Have any other promises been made?
A. Yes. (Tr. 39-40)

Thereafter the questioning turned to other matters and the specifics of the remaining promises were not further elicited on direct.

of the fact of such promised protection and made a sound tactical decision not to explore it. Indeed, in a colloquy between court and counsel in relation to another government witness, Vidalina Reyes, counsel for Rene Texeira summed up the defense position:

> "Judge, after consultation with co-counsel, I think the Court is quite right in his initial observation. We probably would be more hurt than helped by bringing out protective custody. We will not bring it out in any way, shape or form." (Tr. 229)

In short, the government provided counsel for defendants with information of each and every promise it had made to Pamela Ramirez and every other government witness. Defendants have failed utterly to specify any other alleged promise to Mrs. Ramirez by the government of which they were unaware at trial. The existing record makes clear that their present unparticularized claims of government misconduct are thoroughly without merit.

C. Defendants have failed to make any showing that they were denied the effective assistance of counsel.

Defendants seek to bootstrap their first asserted ground of error regarding the court's jury charge into a third and final claim, contending that their showing on the first point further demonstrates that they were denied effective assistance of counsel (Defendants' Brief at 10-11). Since the first claim is thoroughly frivolous, this last claim, too, must fail.*

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* While the text of defendants' argument on this issue makes no attack on defense counsels' handling of the issue of precisely what promises had been made to Pamela Ramirez, a brief reference to the same appears at the tail end of defendants' Point II (Defendants' Brief at 9). Since, as demonstrated above, there was no governmental misconduct or failure on the part of counsel to explore Mrs. Ramirez' motive or bias, this predicate for relief is equally unavailing.

It is settled in this Circuit that a conviction will be reversed on the ground that defendant was denied the effective assistance of counsel only when the representation is so inadquate "as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." *United States* v. *Wright*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950). This standard has recently been reaffirmed. *United States* v. *Ortega-Alvarez*, 506 F.2d 455 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States* v. *Yanishefsky*, 500 F.2d 1237 (2d Cir. 1974). Defendants' contentions of ineffective assistance of counsel—premised on counsels' asserted failure to perceive and articulate a ground of error which in fact does not exist—utterly fail to meet this standard.

On trial and direct appeal all defendants were represented by a competent counsel of their own choosing. Defendants' attempts to discredit counsels' representations are as frivolous as the spurious claims on which they rest and present no grounds for the granting of relief.

CONCLUSION

The orders of the District Court should be affirmed.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ANGUS MACBETH,
JOHN C. SABETTA,
Assistant United States Attorneys,
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Angus Macbeth being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 22nd day of December, 1975, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Francis Texeira, 77733
PO Box PMB
Atlanta, Georgia 30315

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Angus Macbeth

Sworn to before me this
22nd day of December, 1975
Allen R. Bentley

Commission Expires